IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.11.2018

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Civil Miscellaneous Appeal Nos.2704 and 2705 of 2018

M/s.Rao and Khan Motors (P) Ltd.,
2/625-1 Krishnagiri Byepass Road,
Hosur-635 109. ... Appellant in both the Appeals

M/s.Rao and Khan Motors (P) Ltd.,
Krishnagiri-635 001. ... Appellant in CMA 2705 of 2018

-vs-

The Commissioner of Central Excise and Service Tax,
Salem Commissionerate,
No.1, Foulks Compound, Anaimedu,
Salem-636 001. ... Respondent in both the Appeals

Civil Miscellaneous Appeals filed under Section 35G of the Central Excise Act, 1944 to set aside the common order passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, dated 26.02.2018 in Final Order Nos.40572 and 40573 of 2018.

For Appellant (in both the Appeals) : Ms.P.Srija for Mr.G.Natarajan

For Respondent (in both the Appeals) : Mrs.Aparna Nandakumar, Senior Standing Counsel

COMMON JUDGMENT

(Delivered by T.S.Sivagnanam, J.)

Heard Ms.P.Srija, learned counsel appearing for the appellant and Mrs.Aparna Nandakumar, learned Senior Standing Counsel for the Revenue.

2. The above appeal has been filed raising the following substantial question of law:-

> "Whether the Hon'ble Tribunal is correct in considering 10.12.2014 as the date of receipt of the Orders in Appeal No.23/2014 dated 01.12.2014 by the appellant, in the absence of any proof of delivery, which is mandatory in respect of service of order through Speed Post under Section 37C of the Central Excise Act, 1944 which is made applicable to Service Tax under Section 83 of the Finance Act, 1994?"

3. At the request of the Court, the learned Senior Standing Counsel has accepted notice and though the learned counsel submits that necessary instructions have been secured from the Department, we find that, since the issue involved in this case lies in a very narrow compass, the matter can be disposed of at this stage so as to enable the Tribunal to take a decision on merits.

4. The assessee filed appeals before the first appellate authority challenging the Orders-in-Original dated 28.09.2011.

5. The learned counsel for the appellant would submit that the appeal petitions were heard by the Commissioner. However, no orders were communicated to them and the Department sent a notice dated 10.08.2016, calling upon the appellant to furnish details about the stage of the appeals filed before the Commissioner. On receipt of the notice, the assessee is said to have verified from the office of the Commissioner, and was informed that the Orders-in-Appeal have been passed on 01.12.2014 and despatched to the assessee on 08.12.2014.

6. According to the assessee, they have not received the copy of the order. Therefore, on coming to know of the same, they approached the jurisdictional Central Excise Officer, sought for a certified true copy of the same, which was furnished to the assessee on 15.12.2016. The assessee filed appeals before the Tribunal on 25.09.2017.

7. According to the Department, there were two spells of delay, namely, the period between the date on which the Orders-in-Appeal were passed and the date on which the period of limitation expired; and the date on which the appellant received the certified true copy of the order from the jurisdictional Central Excise Officer and the date of presentation of the appeal before the Tribunal. In total, the delay was 390 days.

8. The learned counsel for the assessee submits that even prior to issuance of show cause notice, the entire duty and interest has been paid, which has been duly appropriated while passing the Orders-in-Original dated 28.09.2011. So far as the penalty is concerned, after they received the copy of the order, the penalty imposed under Section 78 of the Central Excise Act, 1944 (hereinafter referred to as "the Act") was paid.

9. Further, it appears that the assessee was not properly advised and still, the demand of interest under Section 76 of the Act was pending. According to the assessee, in terms of proviso to Section 78(1), Section 76 would have no application, if penalty is made payable under Section 78. However, subsequently, the assessee was advised properly that they should contest the matter, and accordingly, the appeals were filed along with applications to condone the delay of 195 days by reckoning the date from the date of receipt of the certified copy of the Orders-in-Appeal being the date of knowledge of the appellant about such order. The appellant had set out all the above mentioned fact including the facts that penalty under Sections 76 and 77 are not leviable.

10. Furthermore, the assessee also reiterated that the entire duty and interest were paid much prior to the issuance of show cause notice. The Department did not have any record to controvert what has been said by the assessee, thus, virtually admitted the case of the assessee. In any event, there is no loss of revenue to the Department, since the entire duty and interest had already been paid as also penalty under Section 78.

11. Thus, in our considered view, the Tribunal could have examined the matter on merits. Since very often, several appeals are filed before this Court by the Department with delay of more than 300 days. In case, the delay in presenting the papers also is more than 200 days, yet the Court exercises its discretion and condone the delay, so that the parties can agitate the matter on merits and a decision can be taken on the questions of law raised.

12. Law of limitation is founded on principles of public policy so as to attach penalty to a proceeding. Limitation is not intended to destroy the rights of parties. No prudent man would purposely lodge an appeal belatedly, unless and until the person has some mala fide intention to do so. We find no such allegation against the appellant. Therefore, this is a fit case where the Tribunal could have adopted the principle of liberty but, the same having not been done, we are inclined to do so.

13. Accordingly, the above referred substantial question of law is answered in favour of the assessee and the appeals are allowed, the order passed by the Tribunal is set aside and the matter is remanded to the Tribunal for a decision on merits. No costs. It is open to the assessee to canvass all points including the contention which they sought to advance before us, with regard to imposition of penalty under Section 76 of the Act.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To

1.The Commissioner of Central Excise
and Service Tax,
Salem Commissionerate,
No.1, Foulks Compound, Anaimedu,
Salem-636 001.

2.Customs Excise and Service Tax
Appellate Tribunal,
South Zonal Bench, Chennai.

+1cc to Mr.S.Jaikumar, Advocate Sr.79642
+1cc to M/S.Aparna Nandakumar, Advocate Sr.79738

C.M.A.Nos.2704 and 2705 of 2018

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srg 24/12/2018